GAO YI

v.

PP

HIGH COURT SABAH & SARAWAK, KUCHING
LAU BEE LAN J
[CRIMINAL APPEAL NO: 42-11-2006-II]
14 SEPTEMBER 2006

CRIMINAL PROCEDURE: *Sentence - Appeal against sentence - Appellant sentenced to three months' imprisonment for an offence under reg. 39(b) Immigration Regulations 1963 - Plea of guilt - Whether trial judge erred in imposing an imprisonment sentence instead of a fine - Whether custodial sentence imposed manifestly harsh and excessive - Whether trial judge failed to consider appellant's plea of mitigation - Public interest - First offender*

The accused, a Chinese national, was charged with contravening the conditions of a social visit pass endorsed in her passport, an offence under reg. 39(b) of the Immigration Regulations 1963 ('Regulations'), and sentenced by the learned Sessions Court Judge ('SCJ') to three months' imprisonment on her own plea of guilt. The appellant appealed against the sentence, contending: (i) that the learned SCJ erred in imposing an imprisonment sentence instead of a fine; and (ii) that the custodial sentence imposed was manifestly harsh and excessive in the circumstances, and that there was a failure on the part of the learned SCJ to consider the appellant's plea of mitigation.

Held (allowing the appeal in part):

(1) The punishment for an offence under reg. 39(b) of the Regulations is upon being found guilty and convicted, the offender "shall be liable on conviction to a term of imprisonment not exceeding six months or to a fine not exceeding one thousand ringgit or to both such imprisonment and fine". The learned SCJ was conscious of the fact that it was not mandatory to impose a custodial sentence and that she was entitled to impose a sentence of imprisonment or a fine when she found that a fine alone would not be of sufficient deterrence to the accused or potential offenders, regard being had to the plea of guilt, the mitigation plea and the public interest. She had an absolute discretion do as such

A and her approach as to the meaning to be accorded to the phrase "shall be liable" was supported by numerous case law authorities. Therefore, the appellant's submission was without merit as it had misconstrued the judgment of the learned SCJ. (para 8)

B

(2) It was patently clear from the judgment that foremost in the mind of the learned SCJ was the public interest factor, which according to the case of *R v. Ball* has a two-fold effect of deterrence and rehabilitation. Apart from the public interest C consideration, the learned SCJ also took into account the appellant's guilty plea and mitigation plea for leniency; hence, the appellant's allegation that the plea of guilt was not considered was incorrect. However, the learned SCJ did not take into account that the appellant was a first offender in her D judgment. By this omission, the learned SCJ had not acted in accordance with the correct sentencing principles which had occasioned a miscarriage of justice, when in fact some discount ought to be given for the fact that the appellant was a first offender. (para 9)

E

[Sentence reduced to two months' imprisonment.]

Case(s) referred to:
Jayanathan v. PP [1972] 2 MLJ 68 ***(refd)***
PP v. Alfred Vincent [2004] 6 CLJ 515 HC ***(refd)***
F *PP v. Man Ismail [1939] MLJ 207* ***(refd)***
PP v. Mohamed Nor & Ors [1985] 2 MLJ 200 ***(refd)***
PP v. Muthu Subramaniam Seeniservai [2001] 7 CLJ 236 HC ***(refd)***
PP v. Yong Thiam Fatt [1980] 2 MLJ 145 ***(refd)***
R v. Ball 35 Cr App R 164 ***(refd)***
Zaidon Shariff v. PP [1996] 4 CLJ 441 HC ***(refd)***

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Legislation referred to:
Criminal Procedure Code, s. 377(b)
Immigration Regulations 1963, reg. 39(b)

For the appellant - Lim Lian Kee; M/s LL Kee & Co
H *For the respondent - Musli Ab Hamid DPP*

Reported by Suresh Nathan

I

JUDGMENT

Lau Bee Lan J:

[1] The appellant has appealed against the sentence imposed by the learned Sessions Court Judge given on 23 August 2006. The learned Sessions Court Judge had sentenced the appellant to three (3) months imprisonment on her own plea of guilt and the said sentence was to commence from the date of arrest being 9 August 2006.

[2] The appellant stands charged with an offence as follows:

> Bahawa kamu, pada 09 Ogos 2006 lebih kurang jam 6.15 petang, bertempat di bilik no. 232 Liwah Hotel, Jalan Song Thian Cheok Kuching, didalam Daerah Kuching, di dalam Negeri Sarawak telah melanggar syarat-syarat pass lawatan sosial didalam passport No. G09554205 yang diendorskan di muka surat 9 oleh pihak Imigresen Malaysia iaitu melibatkan diri kamu dengan persundalan, oleh yang demikian kamu telah melakukan kesalahan di bawah Peraturan 39(b) Peraturan-Peraturan Imigresen 1963 dan boleh dihukum dibawah Peraturan 39 Peraturan-Peraturan yang sama.

[3] From the brief facts of the case, exh. C it is revealed that on 9 August 2006 at 6.15pm a police team from the Criminal Investigation Department, District Police Headquarters Kuching, led by one ASP Sarifuddin Mustaffa whilst on anti-vice raid arrested the accused a Chinese national, holder of passport no. G09554205 (exh. P1) at Room No. 232 Liwah Hotel, Jalan Song Thian Cheok, Kuching, for engaging in prostitution and also recovered from the said room 9 pieces of condom (recorded as 6 packets of unused condom in the record of appeal (ROA) p. 5 but admitted by the accused) (exh. P2), 2 tubes of personal lubricant jelly K.Y. brand (exh. P3) and a Yellow Pages book (exh. P4). Investigations revealed the accused entered Sarawak on 13 July 2006 on a social visit pass which was endorsed on p. 10 of the said passport (I note that the charge states p. 9 when it should in fact be p. 10 and it was also recorded as such in the ROA at p. 5, hence there is no prejudice caused to the accused as it is a mere typographical error) (exh. P1A) had used the said passport for the purpose of being involved in prostitution in contravention of the condition endorsed on p. 10 ie, "Work is prohibited and must leave Malaysia before expiry of pass" and "Permitted to enter and remain in Sarawak/Malaysia for thirty (30) days on social visit

pass only from the date shown above" (emphasis added) and the date was stamped as 13 July 2006. The appellant was later charged as per charge.

[4] The appellant represented by Mr Lim Lian Lian Kee has appealed against the sentence primarily on three (3) grounds:

(1) the custodial sentence imposed is manifestly harsh and excessive in the circumstances;

(2) failure on the part of the learned SCJ to consider the mitigation plea; and

(3) the learned Sessions Court Judge erred in imposing imprisonment sentence instead of a fine.

[5] The court is mindful of the principles to be heeded by the court when exercising its appellate jurisdiction concerning sentence as has been elucidated by Abdul Hamid CJ (as he then was) (delivering judgment on behalf of the Supreme Court) in *PP v. Mohamed Nor & Ors* [1985] 2 MLJ 200 at p. 202 as follows:

> ... it is the established principle that an appellate court should be slow to interfere or disturb with a sentence passed by the court below unless it is manifestly wrong in the sense of being illegal or of being unsuitable to the proved facts and circumstances. And the mere fact that another court might pass a different sentence provides no reason for the appellate court to interfere if the court below applies the correct principles in the assessment of the sentence.

[6] Applying the ratio of the aforesaid case and in the light of the submissions of the learned defence counsel and the learned DPP *vide* their written submission (encls. 11 and12) respectively, I come to the following findings.

[7] At the outset I wish to address a preliminary point raised by the defence that the Letter of Authorisation to Prosecute (exh. A) is defective and bad in law for the reasons that (i) it is undated, (ii) authorisation to conduct prosecution was given to Probationary Inspector Ramesh a/l Kandasamy who is now a Chief Inspector and (iii) Tun Abd. Majid b Tun Hamzah the then DPP in Sarawak (also SFC) who gave the authorisation has ceased to hold the post and the authorisation has not been renewed. Based on the original copy of the said Letter of

Authorisation to Prosecute, it is not undated but is dated 1 April 1998. As correctly pointed out by the learned DPP s. 377(b) of the CPC under which the said authorisation emanates, states "subject to the control and direction of the PP" "a police officer not below the rank of Inspector" is authorised to conduct prosecution. The fact that the Inspector Ramesh a/l Kandasamy is now a Chief Inspector and at the time when he was so authorised to conduct prosecution he was a Probationary Inspector is immaterial because it does not detract from the fact that he is "police officer not below the rank of Inspector". Section 377(b) does not make mention of any requirement for renewal of the authorisation. What is of significance is the purpose for which the authorisation is granted is circumscribed in the following terms "Pemberian kuasa ini adalah sah dan berkuatkuasa selama tempoh masa Pegawai yang namanya dinyatakan di atas bertugas di SARAWAK dan menjalankan tugas-tugas pendakwaan."; in this regard there is no dispute that Chief Inspector Ramesh a/l Kandasamy is the P.O. of Sessions Court I, meaning he is still serving in Sarawak and is still conducting prosecution. Therefore, in my view the exh. A is not defective and bad in law but valid for the purpose it was issued.

[8] It is fitting that I begin with Ground 3 first. The punishment for an offence under reg. 39(b) of the Immigration Regulations 1963 is upon being found guilty and convicted, the offender "shall be liable on conviction to a term of imprisonment not exceeding six months or to a fine not exceeding one thousand ringgit or to both such imprisonment and fine". The learned Sessions Court Judge was conscious of the fact that it was not mandatory to impose a custodial sentence and that she was entitled whether to impose a sentence of imprisonment or of fine when she said "It is therefore my view that fine alone would not be sufficient deterrence to the accused or potential offenders. With this in mind regard being had to the plea of guilt, the mitigation and the public interest, I sentence the accused to three months imprisonment with effect from the date of arrest." (emphasis added). In this regard I agree with the prosecution's submission that the learned Sessions Court Judge has an absolute discretion to impose sentence of imprisonment or fine only and the learned Sessions Court Judge's approach as to meaning to be accorded the phrase "shall be liable" is supported by the case law in the authorities of *Public Prosecutor v. Man bin Ismail* [1939] MLJ 207, *Jayanathan v.*

Public Prosecutor [1972] 2 MLJ 68 and *Public Prosecutor v. Yong Thiam Fatt* [1980] 2 MLJ 145. Therefore, I find the defence's submission is without merit as the learned defence counsel has misconstrued the judgment of the learned Sessions Court Judge. Further, the additional submission of the defence counsel "On the assumption that imprisonment term is compulsory or mandatory then all the sentences passed by the learned Sessions Court Judges recently and in the past are all wrong. Because no imprisonment sentence was imposed; most of them given a fine of RM1000" is irrelevant.

[9] I shall deal with Grounds 1 and 2 together. It would be useful to refer to the principles governing the imposition of an appropriate sentence enunciated in *R v. Ball* 35 Cr. App. R 164:

> In deciding the appropriate sentence a Court should always be guided by certain considerations. The *first and foremost is the public interest*. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. *A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition that, if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing a crime again, or induce him to turn from a criminal to an honest life.* The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living. Our law does not, therefore, fix the sentence for a particular crime, but fixes a maximum sentence and leaves it to the Court to decide what is, within that maximum, the appropriate sentence for each criminal in the particular circumstances of each case. *Not only in regard to each crime, but in regard to each criminal, the Court has the right and the duty to decide whether to be lenient to severe.* (emphasis added).

(See *Zaidon Shariff v. PP* [1996] 4 CLJ 441). The learned Sessions Court Judge stated "In passing sentence I have in mind the fact that in breach of the condition in the social visit pass, the accused had engaged in prostitution, which is an offence under Penal Code". It is patently clear from the judgment foremost in the mind of the learned Sessions Court Judge was the public interest factor which according to the case of *R v. Ball (supra)* has a two fold effect by deterrence and rehabilitation. In this regard with due respect to the learned defence counsel in my view his statement that the appellant has been made a scapegoat of others in relying on *PP v. Muthu Subramaniam Seeniservai* [2001] 7 CLJ 236 is

misplaced because soon after that even the learned JC (as she then was) at p. 240 stated, "Each crime and each criminal must be treated separately and differently if the facts and circumstances should warrant such treatment." Apart from the public interest consideration, the learned Sessions Court Judge also took into account the fact that the appellant pleaded guilty, the mitigation of the appellant for leniency; hence the learned defence counsel's allegation that the plea of guilt was not considered is incorrect. I observe that the learned Sessions Court Judge did not take into account that the appellant is a first offender in her judgment as submitted by the learned defence counsel. In my view, by this omission, the learned Sessions Court has not acted in accordance with the correct sentencing principles which has occasioned a miscarriage of justice when in fact some discount ought to be given for the fact that the appellant is a first offender.

[10] For completeness, I refer to the attempt by the learned DPP to introduce statistics to justify that the sentence should not be disturbed and urged the court to take cognisance of the rampancy of the instances, where foreign nationals were arrested on suspicion of being engaged in vice activity but were not charged due to the difficulty of procuring sufficient evidence, by tendering statistics contained at p. 34 of Prosecution's Bundle of Authorities (enc. 13) signed by ASP Sarifuddin Mustaffa from Criminal Investigation Department, District Police Headquarters Kuching (the same police officer who headed the raid in this instant case). The learned defence counsel opposed the tendering of such statistics and submitted it should not be considered by the court on the basis that it is akin to the tendering of fresh evidence. In this regard I would like to adopt the approach taken in *PP v. Alfred a/l Vincent* [2004] 6 CLJ 515 and disregard the statistics. Abdul Hamid Embong J (now Court of Appeal judge) when considering an appeal by the prosecution on the adequacy of sentence contending that the rampancy of the offence had not been taken into account when the sentence was imposed and attempted to produce some statistics on similar offences of snatch theft, disallowed the move at p. 517 "because the court held the view that any statistics should have been produced at the first instance before the magistrate who passed the sentence."

[11] In the light of the foregoing circumstances, I am constrained to interfere with the sentence imposed by the learned Sessions Court Judge and allow the appeal and I hereby reduce the sentence from three (3) months imprisonment to two (2) months imprisonment.